Supreme Court, U.S.
FILED

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No. _____

In The
# Supreme Court Of The United States
**October Term, 1996**

JOHN KRONBERG, ET AL.
*Petitioners*

v.

CHICAGO TITLE INSURANCE COMPANY, ET AL.
*Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

IS THE APPLICATION OF CONNECTICUT RULES APPELLATE PROCEDURE, §4046, §4049, AND §4053 TO THE FACTS OF THIS CASE REPUGNANT TO THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SINCE IT PERMITS THE LIFTING OF THE AUTOMATIC STAY OF EXECUTION WITHOUT AFFORDING PETITIONER AN OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME AND MEANINGFUL MANNER ON THEIR SPECIAL DEFENSES AND COUNTERCLAIMS PRIOR TO BEING DEPRIVED OF POSSESSION OF THEIR HOME THROUGH FORECLOSURE.

## PARTIES TO THE PROCEEDING

**PETITIONERS:**

John W. Kronberg, Sr. (Defendant Below)
Constance Kronberg
Michael Kronberg

**RESPONDENTS:**

Chicago Title Insurance Company
Union Trust Company
N.P. Funding I Lim.Part.
Dime Savings Bk of Wallingford
Lafayette American Bank & Trust Company, fka American National Bank
State of Connecticut

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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1996

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JOHN KRONBERG, ET AL
Petitioners,

V.

CHICAGO TITLE INSURANCE COMPANY, ET AL
Respondents

---

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES**

---

The petitioners, John, Constance and Michael Kronberg respectfully pray that a writ of certiorari issue to review the decision of the Connecticut Supreme Court entered on July 3, 1997 dismissing petitioners' Petition for Certification to appeal from the judgment of the Connecticut Appellate Court which denied petitioner's Motion to Review the trial court's lifting of the automatic stay and the procedure which allows for lifting same.

## OPINION BELOW

The opinion of the Connecticut Supreme Court is printed in Appendix A, infra, page 1A. The opinion of the Connecticut Appellate court is printed in Appendix B, infra, page 2A. The trial court (Celotto, J.) granted the respondent's Motion to Lift the Automatic Stay of Execution on April 18, 1997, in the Superior Court, Judicial District of New Haven at New Haven, CV 91 0317554S.

## JURISDICTION

Jurisdiction for the petition for writ of certiorari is invoked under 28 U.S.C.S. §1257(a) which sets forth in relevant part:

> (a) Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the...validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution...

The trial and appellate court's lifting of the automatic stay was a final judgment within the meaning of §1257(a) even though an appeal of the underlying foreclosure action is still pending because there has been a final assertion of jurisdiction with no further review of the issue of the lifting of the stay possible at the state court level.

> Concept of finality has been expanded with respect to orders that otherwise might be deemed

interlocutory, where there is final assertion of jurisdiction with no further review of that issue possible in state court,...and state court judgment on issue is anterior to and separable from merits, and not enmeshed in factual controversies of case. *Construction & General Laborers' Union v. Curry*, 371 US 542 (1963), on remand 219 Ga 38, 131 SE2d 559, 54 BNA LRRM 2197, 48 CCH LC 50910; *Mercantile National Bank v. Langdeau*, 371 US 555, (1963); *Organization for a Better Austin v Keefe*, 402 US 415 (1971).

The opinion of the Appellate Court of the State of Connecticut, denying review of the lifting of the stay was entered on May 21, 1997 and the opinion of the Supreme Court of the State of Connecticut, Appendix A, infra, page 1A, dismissing the petition for writ of certiorari was entered on July 3, 1997.

## CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1

The Connecticut Practice Book, Rules of Appellate Procedure are as follows:

Connecticut Rule of Appellate Procedure, §4046
Connecticut Rule of Appellate Procedure, §4049
Connecticut Rule of Appellate Procedure, §4053

## STATEMENT OF CASE

John W. Kronberg, Constance Kronberg, and Michael Kronberg reside at 1755 Tuttle Avenue, Cheshire, Connecticut and all have a possessory interest therein. On or about August 13, 1986, the defendant John W. Kronberg executed a first mortgage and note to the Connecticut Savings Bank in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, secured by his interest in real property at 1755 Tuttle Avenue, Cheshire, Connecticut. On October 9, 1990 John W. Kronberg rescinded the transaction based upon inadequate disclosures under truth-in-lending statutes. On or about January 1, 1991 the instant foreclosure action was commenced by Federal Home Loan Mortgage Corporation. Constance and Michael Kronberg were not served. On January 11, 1991, F. Woodward Lewis entered his appearance for John W. Kronberg, Constance Kronberg and Michael Kronberg and on January 11, 1991 Constance and Michael Kronberg made a Motion to become party defendants because of their possessory interest in the real estate being foreclosed.

On February 25, 1991, the Kronbergs filed their general denial answer, special defenses and counterclaims. The first special defense alleged violations of the truth-in-lending laws. The second special defense alleged that the defendant Constance Kronberg and Michael Kronberg were not served with a notice to quit as required by §47a-23 so that the court lacked jurisdiction on the issue of possession and/or the foreclosure was unconstitutional because it did not provide for notice and hearing on the issue of possessory rights. Count One of the counterclaim alleged recoupment on the theory of violations of the truth-in-lending laws and count two alleged violations of the

Connecticut Unfair Trade Practices Act (CUTPA) based upon the said special defenses; i.e, truth-in-lending violation as to John Kronberg and failure to give notice to Michael and Constance Kronberg.

On or about February 26, 1991, Federal Home Loan Mortgage filed an Amended Complaint making Constance Kronberg and Michael Kronberg defendants.

On or about September 22, 1994, Federal Home Loan Mortgage filed a Motion to Strike. On or about November 7, 1994, Judge Celotto orally struck the answer and counterclaims as to John Kronberg and the second special defense and CUTPA counterclaim as to Constance and Michael Kronberg. The court did not strike the first special defense in truth-in-lending, rather the motion to strike same was withdrawn by plaintiff's counsel.

On November 9, 1994, the Kronbergs filed a Revised Answer and upon receiving notice on November 14, 1994 of the court's decision striking the special defenses and counterclaims filed a timely notice of intent to appeal on or about December 2, 1994. Thereafter, on December 9, 1994 the defendants filed a Motion for Judgment on said stricken special defenses and counterclaims.

On April 21, 1995 Federal Home Loan moved for Summary Judgment to which the Kronbergs objected. On September 25, 1995 the court heard both the Summary Judgment and the Motion for Judgment, ruled thereon and the Kronbergs filed the instant appeal on October 12, 1995. Thereafter, through a series of assignments, Chicago Title Insurance Company (hereinafter "Chicago Title") became the plaintiff.

The Appellate court on January 24, 1996 stayed the appeal pending the foreclosure judgment.

On March 7, 1997 a hearing was held on Chicago Title's Motion for Strict foreclosure and the court granted

said Motion, and refused to hear evidence on the first special defense alleging truth-in-lending violations, and the consequent recision of the mortgage being foreclosed. The court also failed to permit Constance and Michael Kronberg to be made parties although both the plaintiff and the defendant had treated them as such up until the filing of the original appeal. Thereafter, the Kronbergs timely filed an amended appeal on March 12, 1997 setting forth the following six issues:

1. Did the trial court abuse its discretion by granting summary judgment as to liability on the note?
2. Did the trial court abuse its discretion by striking all but one of defendant Kronberg's counterclaims and special defenses on November 7, 1994?
3. Did the trial court abuse its discretion by not permitting the defendant Kronberg a hearing on the truth in lending special defense?
4. Did the trial court abuse its discretion by not allowing the defendant John Kronberg to add an indispensable party?[1]
5. Did the trial court err in accepting an appraisal which reflected the value of the property at a time when access was allowed but did not reflect the value after foreclosure where zoning prohibits access?
6. Such other issues as may arise during the course of this appeal.

On April 7, 1997, Chicago Title pursuant to

---

[1] Tenants Constance and Michael Kronberg.

Connecticut Rule of Appellate Procedure §4056 filed a Motion to Terminate the Automatic Stay arguing that the stay should be terminated because it was taken solely for delay and/or the interests of justice so required. Despite objection by the Kronbergs to the Motion to Terminate the Automatic Stay, the trial court on April 18, 1997 granted said Motion. The defendant John Kronberg thereafter on April 24, 1997 filed a Motion for Review pursuant to Connecticut Rule of Appellate Procedure §4053 on April 24, 1997 arguing that he had a fundamental property interest at stake and due process entitled him to his day in court, i.e. to be heard at a meaningful time and in a meaningful manner and that lifting the stay deprives him of this right because if the defenses to the loss of the property by foreclosure are not allowed to be heard before the property interest is lost, there is no point in having and/or raising said defenses. Despite this argument, the Appellate Court, without hearing, denied the Motion for Review on May 21, 1997. The Kronbergs petitioned the Connecticut Supreme Court for certification to appeal from the judgment of the Appellate Court on the basis that the procedure permitting the lifting of the automatic stay was unconstitutional. However, the Supreme Court dismissed said petition for certification on July 3, 1997.

Therefore, even though there has never been a trial on the Kronbergs' special defenses and counterclaims, because of the lifting of the stay the pending appeal in this case is fruitless because even if successful the defendants will have lost the property at issue.

## REASONS FOR GRANTING THE WRIT

The petitioners herein respectfully request that this Court issue a writ of certiorari because the procedure set

forth in §4046, §4049 and §4053 is repugnant to U.S. CONST amend XIV, §1 since the effect of allowing the lifting of the automatic stay is to deny the petitioners any opportunity to be heard on the merits of their appeal prior to losing possession of their home through foreclosure.

The procedure lifting the automatic stay and allowing for appellate review of same is set forth in Connecticut Practice Book, Rules of Appellate Procedure §4046, §4049, and §4053. Rule §4046 provides in pertinent part: "The automatic stay of execution may be terminated by the judge who tried the case if he or she is of the opinion that the appeal is taken only for the purpose of delay or that the due administration of justice requires that the stay be terminated."

Rule §4049 provides, "[t]he sole remedy of any party desiring the court to review an order concerning a stay of execution, shall be by motion for review under Sec. §4053." Rule §4053 provides in pertinent part, "[t]he court may, on written motion for review stating the grounds for the relief sought, modify or vacate...any order made by the trial court concerning a stay of execution in a case on appeal."

This procedure is unconstitutional as applied to the facts of this case since it does not allow the applicants an effective opportunity to be heard on the merits of either their truth-in-lending claims or their possessory interest claims to the subject property **prior to its loss by virtue of the termination of the automatic stay** and therefore fails to provide an opportunity to be heard at a **meaningful time** and a meaningful manner in violation of due process standards.

It is fundamental that property cannot be taken without procedural due process as guaranteed by the

> fourteenth amendment to the Constitution of the United States and article first, §10, of the Constitution of Connecticut. For more than a century, the central meaning of procedural due process has been clear. **Parties whose rights are to be affected are entitled to be heard**... *Baldwin v. Hale*, 68 U.S. 223, 233, 17 L.Ed 531; *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914, *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841, 42 L. Ed 215; *Grannis v. Ordean*, 34 U.S. 385, 34 S.Ct. 779, 58 L. Ed. 1363. It is equally fundamental that the right to notice and **an opportunity to be heard "must be granted at meaningful time and in a meaningful manner.**" *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62. The United States Supreme Court has reiterated that these fundamental requirements apply to the deprivation of "any significant property interest." *Boddie v Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed. 113....

*Roundhouse Construction Corp. v. Telesco Masons Supplies Company*, 168 Conn. 371, 362 A. 2d 778, 781 (1975).

The "effective opportunity to be heard is the gravamen of the currently accepted standards of procedural due process in the area of property rights..." *Roundhouse, supra*, at 781. The lifting of the stay procedure prior to being heard on the merits of their appeal seeking to protect petitioners' right to possession deprives them of this effective opportunity.

The United States Supreme Court has long since employed the following three part inquiry originally set

forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed 2d 19 (1971) and modified by *Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S.Ct. 2105, 2112, 115 L.Ed. 2d (1991) to determine whether a due process violation has occurred in the context of a dispute between private parties:

> ...[I]nquiry requires "first, consideration of the private interest that will be affected by the [procedure to lift the stay]; second, an examination of the risk of erroneous deprivation through the [procedure to lift the stay] and the probable value of additional or alternative safeguards; and third...principal attention to the interest of the party seeking the [lifting of the stay] with, nonetheless, due regard for any ancillary interest the government may have in providing the [lifting of the stay] or forgoing the added burden of providing greater protections."

Applying this analysis to the present case clearly illustrates the Kronbergs have been denied due process by the lifting of stay procedure. With respect to the first prong of the analysis the defendant John Kronberg and Constance and Michael Kronberg who have sought to become parties, all have a possessory interest which is affected by the lifting of the stay. Constance and Michael Kronberg as tenants of the subject property have had a possessory interest in the premises being foreclosed since at least August 13, 1987 and are thus entitled to an opportunity to be heard on the issue of possession. *Hite v. Field*, 38 Conn. Sup. 70,. 462 A. 2d 393 (1982). The defendant John Kronberg currently lives in the property and before being deprived of possession by virtue of the lifting of the stay, he is entitled to an opportunity to be heard on the merits of

his special defenses and counterclaim which raise the issue of whether due to a valid recision under truth in lending he, rather than the plaintiff, is entitled to remain in possession. Lifting the stay not only affects the Kronbergs' possessory interest, but deprives them of it altogether.

With respect to the second inquiry since the lifting of the stay does not afford an hearing on the issue of possession, the defendant John Kronberg and Constance and Michael Kronberg are left without an opportunity to ever protect their right to possession through presentation of their special defenses and counterclaims. The additional safeguard of allowing the stay to remain in effect while the defendants presents the merits of their claims on appeal substantially reduces the risk of erroneous deprivation.

Lastly, such an additional safeguard does not unduly impair whatever interest the plaintiff may have. If the defendants succeed in their appeal and are successful in presenting their special defenses and counterclaims at the trial court level it will mean they are entitled to the property and not the plaintiff. On the other hand, if defendants do not succeed, the plaintiff will still obtain possession at the time it acquires title if it is so entitled.

## CONCLUSION

The procedure followed in the instant case which allowed for the stay to be lifted deprived the petitioners' of their due process rights to be heard at a meaningful time and in a meaningful manner and is therefore unconstitutional. The petitioners are entitled to be heard on the merits of their appeal at the Appellate Court without risk of deprivation of that which they are seeking to protect. Due process therefore requires that the stay remain in place. Nothing less will provide the applicants with the effective

opportunity to be heard they are entitled to under both Connecticut Supreme Court and United States Supreme Court precedent. The specter of having lost the property and or any rights therein might well discourage and chill petitioners rights to seek both Appellate Court and Supreme Court review even if they do prevail.

For all the reasons enumerated above, the petitioners John, Constance and Michael Kronberg pray this honorable court accept their petition for writ of certiorari.

RESPECTFULLY SUBMITTED,

BY F. WOODWARD LEWIS, JR.
Attorney for Petitioners
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Federal Bar #ct06737
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No. _____

In The

# Supreme Court Of The United States

October Term, 1996

JOHN KRONBERG, ET AL.

*Petitioners*

v.

CHICAGO TITLE INSURANCE COMPANY, ET AL.

*Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

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APPENDIX A

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-96-0407

Federal Home Loan Mortgage Corporation

V.

John W. Kronberg et al

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendants John Kronberg, Constance Kronberg and Michael Kronberg for petition for certification to appeal from the Appellate Court [AC 15288], it is hereby ordered that said petition be, and the same is hereby dismissed.

Berdon, J. did not participate in the discussion or decision of this petition for certification.

BY THE COURT,

s/

_____

ASSISTANT CLERK-APPELLATE

Dated: July 3, 1997

Notice sent: 7/3/97

Clerk, Superior Court, New Haven 0309163S

Clerk, Appellate court

Reporter of Judicial Decisions

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F. Woodward Lewis, Jr. in support of petition; Thomas A. Kaelin in opposition

APPENDIX B

NO. A.C. 15288

FEDERAL HOME : APPELLATE COURT
LOAN MORTGAGE CORPORATION

V. : STATE OF CONNECTICUT

JOHN W. KRONBERG, :MAY 21, 1997

ORDER

THE MOTION OF THE DEFENDANT FILED APRIL 25, 1997 FOR REVIEW HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,
s/

_____
ASSISTANT CLERK-APPELLATE

NOTICE SENT: 5/21/97
GAGER & PETERSON
LAW OFFICE OF F. WOODWARD LEWIS, JR., P.C.
LOUGHLIN, HENRICI, MOLLOY & RIZZO, P.C.
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HON. DONALD CELOTTO

# APPENDIX C

## U.S. CONSTITUTION, AMENDMENT XIV

### Section 1. Citizens of the United States

All persons born or naturalized in the Unites States and subject to the jurisdiction thereof, are citizens of the Unites States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## APPENDIX D

## CT RULES OF APPELLATE PROCEDURE

Sec. 4046. - In General

In all actions, except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment shall be automatically stayed until the time to take an appeal has expired; if an appeal is filed, such proceedings shall be stayed until the final determination of the cause; and it the case goes to judgment on appeal, until ten days after the decision is officially released as set forth in Sec. 4120; but if the judge who tried the case is of the opinion that an extension to appeal is sought or the appeal is taken only for delay or that the due administration of justice so requires, that judge may at any time, upon motion and hearing, order that the stay be terminated. This section shall not apply to actions concerning attorney pursuant to chapter 2, to periodic alimony and support orders, as well as to custody or visitation orders in domestic relations matters brought pursuant to chapter 17, to criminal matters brought pursuant to chapter 22 through 30 or to juvenile matters brought pursuant to chapters 31 through 40 other than any transfer orders to the regular criminal docket.

A motion to terminate the stay of execution may be filed before judgment; if it is, it may be ruled upon when judgment is entered. If such a motion is filed before the judgment, or after judgment but before an appeal, it shall be filed in triplicate with the clerk of the superior court. If it is filed after the appeal is filed, an original and three copies shall be filed with the appellate clerk and forwarded to the judge who tried the case and

that judgment shall file any rulings thereon with the appellate clerk and with the clerk of the trial court wherein the matter was tried. If the judge who tried the case is unavailable, the motion shall be forwarded to the clerk of the court in the judicial district where the case was tried and shall be assigned for a hearing and decision to any judge of the superior court.

Unless the chief justice or chief judge shall otherwise order, any stay of proceedings which was in effect during the pendency of the appeal shall continue until the time for filing a motion for reargument has expired, and, if a motion is filed, until its disposition, and, if its granted, until the appeal is finally determined. If no stay of proceedings was in effect during the pendency of the appeal and the decision of the court having appellate jurisdiction would change the position of nay party from its position during the pendency of the appeal, all proceedings to enforce or carry out the decision of the court having appellate jurisdiction shall be stayed until the time for filing a motion for reargument has expired, and, if a motion is filed, until its disposition, and, if it is granted, until the appeal is finally determined.

Sec. 4049. Review of Order

The sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under Sec. 4053. Execution of an order of the court terminating a stay of execution shall be stayed for ten days from the issuance of notice of the order, and if a motion for review is filed within that period, the order shall be stayed pending decision of the motion, unless the court having appellate jurisdiction rules otherwise.

A motion for extension of time to file a motion for review of a ruling concerning a stay of execution must be filed in the trial court but shall not automatically stay the execution after the ten days has expired, except that the trial judge may order a stay pending a ruling on the motion for extension of time.

A decision concerning a stay is a judgment in a trial to the court for purposes of Sec. 4059.

In any case in which there is no automatic stay of execution and in which the trial court refuses or fails to grant a stay expeditiously, an aggrieved party may request a stay of execution of the judgment from the court having appellate jurisdiction pending the ruling of the trial court or pending the filing of and ruling upon a motion for review. The request must be filed with the appellate clerk.

Sec. 4053. - In General

The court may, on written motion for review stating the grounds for the relief sought, modify or vacate any order made by the trial court under Sec. 4040(a) or any action by the appellate clerk under Sec. 4040(c)(2) or any order relating to the perfecting of the record for an appeal or the procedure of prosecuting or defending against an appeal, or any order made by the trial court concerning a stay of execution in a case on appeal. All petitions for review of bail shall be filed in the appellate court. Motions for review shall be filed within ten days from the issuance of notice of the order sought to be reviewed. Motions for review of the clerk's taxation of costs under judgments of the court having appellate jurisdiction shall be governed by Se. 4119.

If a motion for review of a decision concerning a

stay depends on a transcript of evidence or proceedings taken by a court reported, the moving party shall filed with the motion either a transcript or a copy of the transcript order form (JD-ES-38). The opposing party may, within one week after the transcript or the copy of the order from is filed by the moving party, file either a transcript of additional evidence or a copy of the order form.

(2)

No. 97-600

In The

# Supreme Court of the United States

October Term, 1997

JOHN KRONBERG, *et al.*,

*Petitioners,*

*vs.*

CHICAGO TITLE INSURANCE COMPANY,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut*

## RESPONDENT'S BRIEF IN OPPOSITION

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1388

## QUESTION PRESENTED FOR REVIEW

Does the due process clause of the Fourteenth Amendment guarantee the Petitioner a right to an appellate stay during the pendency of his appeal or may a state appellate court terminate an appellate stay upon a finding that an appeal was taken solely for the purpose of delaying enforcement of a judgment and/or that in the interest of justice the stay should be terminated?

## PARTIES TO THE PROCEEDING

The Respondent, Chicago Title Insurance Company's, parent corporations are Chicago Title & Trust Company and Allegheny Corporation. Respondents nonwholly owned subsidiaries are Tri-Safe, Inc., Service Title of Virginia, Inc., LaSalle County Title, LLC, Chicago Title Insurance Company of Puerto Rico, Catco, Inc., CTP, Inc., SKLD, Inc., Title Data, Inc., and Image Library Co., LLC.

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## OBJECTION TO JURISDICTION

Jurisdiction does not exist under 28 U.S.C. § 1257(a) because there has been no final judgment or decree rendered by the highest court in Connecticut. Petitioner's Petition For Connecticut Supreme Court review was dismissed, not denied. The Petition was dismissed because review of a denial of Motion For Review is not a final judgment or determination for which jurisdiction existed for Connecticut Supreme Court Review. *See* Conn. Gen. Stat. § 51-197f; *State v. Ayala*, 222 Conn. 331, 338 (1992); *State v. Carter*, 212 Conn. 811 (1989). As conceded by the Petitioner, his appeal is still pending in Connecticut's intermediate appellate court.

## STATEMENT OF THE CASE

Through manipulation and abuse of the judicial system, including bankruptcy and appellate filings, Petitioner[1] has been able to maintain living in a $330,000, 4,000 square foot home situated on 4.9 acres of land in Cheshire, Connecticut since 1990 without paying one penny towards his payment obligation on the note and mortgage now owned by the Respondent.

Respondent's predecessor in interest commenced a foreclosure action in November of 1991 after the Petitioner defaulted on his payment obligation on a note and mortgage. Five and a half (5 1/2) years later, on March 7, 1997, a Judgment of Strict Foreclosure finally entered. Petitioner had successfully delayed the case for 5 1/2 years. The Petitioner filed an Answer, Special Defenses and Counterclaims to the foreclosure complaint in which he asserted mortgage recision rights on property he no longer owned. On November 7, 1994, the trial

1. Although there are three Petitioners, because only John Kronberg was a party to the action below and was the only obligor on the note and mortgage, he will be referred herein as the "Petitioner".

court (Celotto, J.) granted the Respondent's Motion to Strike[2] the Answer, the Second Special defense and both Counterclaims.[3]

On November 9, 1994, the Petitioner filed a Revised Answer with no special defenses plead. On September 25, 1995, the court (Celotto, J.) granted the Respondent's Motion For Summary Judgment against John Kronberg as to liability on the note and mortgage. The Petitioner and his nonparty spouse and son filed an appeal on October 12, 1995. The Appellate Court dismissed the appeal on January 24, 1996, but *sua sponte* ordered the appeal stayed pending entry of the foreclosure judgment.

The Appellate Court Order resulted in the loss of the appellate stay so Petitioner then had his Corporation, Crown Hill Estates, Inc., who he had earlier quitclaimed title to the subject property, file a bankruptcy petition which invoked the bankruptcy automatic stay. After numerous court hearings and motions, the bankruptcy court granted the Respondent relief from stay effective as of January 13, 1997.[4]

On March 7, 1997, the foreclosure action was tried to the court (Celotto, J) and, after a full evidentiary hearing, a Judgment

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2. Connecticut's motion practice equivalent of a Fed. R. Civ. P. Rule 12(b)(6) motion.

3. The Defendant and nonparty spouse and son had plead unfair trade practices and Recoupment Claims in the counterclaims based upon alleged Truth-in-Lending violations. The Second Special Defense which was purportedly filed by the nonparty spouse and son asserted lack of jurisdiction based upon the Respondent's failure to file a notice to quit.

4. The Bankruptcy Court also ordered in connection with the relief from stay that the debtor corporation pay the Respondent $22,106.53 by March 21, 1997. The debtor has not complied with the Bankruptcy Court order as no payment has been made to date.

of Strict Foreclosure entered. The court found the debt to be $324,724.90, awarded $17,000 in attorney fees and set the first law day for May 12, 1997. On March 12, 1997, the Petitioner filed an amended appeal.[5] Under Connecticut appellate rules of practice, Petitioner once again received the benefit of an appellate stay which became effective automatically upon filing his amended appeal.

On April 2, 1997, Respondent filed its Motion to Terminate the Appellate stay under Connecticut rules of appellate procedure, Connecticut Practice Book Section 4046. A hearing on the motion was scheduled for April 18, 1997. Neither the Petitioner nor his counsel bothered attending the hearing. The trial court, after hearing and a review of the record, granted the Respondent's motion. Petitioner then sought immediate review of the order with the Connecticut Appellate Court pursuant to Connecticut Practice Book Sections 4049 and 4053. The Appellate Court denied the motion on May 21, 1997.

On July 7, 1997, the trial court reopened the foreclosure judgment for the purpose of continuing the foreclosure. To that end, the trial court re-set the law days to begin on August 11, 1997. On August 7, 1997, on the eve of his new law day, Petitioner filed a Chapter 13 bankruptcy petition. The bankruptcy filing triggered the automatic stay which stayed the running of the August law days.

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5. Under Connecticut foreclosure law, under a Judgment of Strict Foreclosure, the owner/borrower will be divested of title on his law day if he does not tender the full amount of the Judgment to the Plaintiff/ mortgagee. A dilatory debtor, therefore, will use every means at his disposal to stay the running of the law day. Stays are typically invoked by the dilatory debtor by either a series of bad faith bankruptcy filings, appellate filings, or a combination of both.

On September 3, 1997, the Respondent filed its Motion for Relief from Stay in the bankruptcy court and a hearing on the Motion was scheduled for October 13, 1997. The bankruptcy court granted the motion and, again, neither the Petitioner nor his counsel attended the hearing.

On October 13, 1997, the trial court reopened the foreclosure judgment and re-set the law days to commence on December 22, 1997. Petitioner has not made one payment under his note and mortgage since 1990 and has failed to make any payment under either of his bankruptcy cases.

## REASONS FOR DENYING THE WRIT

Petitioner has raised a procedural due process challenge to Connecticut's appellate practice that provides a mechanism to terminate an appellate stay when the trial court finds that an appeal has been taken solely for delay or that in the interest of justice the stay should be terminated. Petitioner, however, has not cited one case which supports his argument that he has a constitutionally protected right to have a stay in force throughout the entire course of appellate review. While it is beyond dispute that Petitioner has no constitutionally protected right to appellate review,[6] Petitioner, citing cases for the general proposition that procedural due process requires that ". . . an opportunity to be heard must be granted at a meaningful time and in a meaningful manner" claims to have been denied due process when an appellate stay is terminated. A review of Connecticut's rules regarding termination of appellate stays demonstrates that Petitioner's procedural due process rights were not violated.

Connecticut's procedures for terminating an appellate stay

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6. *See Griffin v. Illinois*, 351 U.S. 12, 21, 76 S. Ct. 640 (1941); *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S. Ct. 913 (1894).

comport fully with the procedural due process requirements of the Fourteenth Amendment. In order to have an appellate stay terminated, a party must file a motion with notice to the opposing side and a hearing must be had on the motion. The opposing party has a right to file an objection and to be heard. *See* Connecticut Practice Book Sections 4046 and 4042. In the present matter, Petitioner received notice of the motion, filed an objection and received notice of the hearing. For reasons only known to Petitioner and his counsel, they chose not to attend the hearing.

The trial court's decision to terminate the appellate stay and findings that the Petitioner's state court appeal was taken solely for delay and that the stay should be terminated in the interest of justice is fully supported by the record and the arguments that were before him. Pursuant to Practice Section 4046, the trial judge may terminate the appellate stay if he is of the opinion that the appeal was taken for solely for delay or if the interest of justice so require. The Petitioner had successfully delayed prosecution of this foreclosure action by filing special defenses and counterclaims, a premature appeal, a bankruptcy case, and an Answer which necessitated a trial. In the Amended Appeal, the Petitioner sought plenary review of all of the trial court's substantive rulings in this matter.

At the hearing on the Motion to Terminate the stay, the court considered and balanced the competing equities. Although the court did not issue a Memorandum of Decision, the Movant presented the court with the following review and analysis of the merits of the Petitioner's appellate issues. First, the Petitioner had insisted on a trial to prove that the value of the property *was substantially less* than the value offered by the Respondent. Based upon the evidence presented and the deference afforded to the trial court as the trier of fact on the issue of fair market

value, there was no basis to believe that a realistic possibility for reversal existed on this issue.[7]

Another appellate issue raised was the denial of the Petitioner's motion to add his spouse and son as new parties. Petitioner asserted that his wife and son were indispensable parties to the foreclosure action under the theory they were tenants and that tenants were indispensable parties. The theory was not supported by Connecticut law. Also, based upon the timing of the motion alone, there was no basis to believe that a realistic chance of reversal existed. The case had been pending for over 5 years and on the morning of trial the Petitioner sought to add these new parties. The granting of the motion would have further delayed this matter and the court acted well-within its discretion in denying the motion.

In connection with the appeal of the order granting summary judgment, the Petitioner appealed under the mistaken belief that he had filed a recoupment special defense. As was made clear at the Judgment hearing, when the Petitioner filed its substitute Answer after the granting of the motion to strike, the Defendant did not allege any special defenses. Therefore, an appeal based upon a defense not plead stood little chance of success.

In balancing the equities, the Judge who terminated the appellate stay was the same Judge who had made every substantive ruling in the foreclosure action. At the hearing on the Motion to Terminate, the Judge was in a position to evaluate

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7. Under either parties evidence as to fair market value, no equity existed and a Judgment of Strict Foreclosure was warranted. The question of equity is only relevant to the question of whether a sale should be decreed and that turns on whether there is sufficient equity in the property to justify the costs of a sale. The Petitioners insisted on presenting evidence to prove an even lower fair market value and his subsequent appeal on this issue supported the conclusion that the appeal was being pursued for reasons other than the merits of the legal determinations.

the likelihood of Petitioner's appellate success and weigh the equities between the parties. The debt owed exceeded the value of the property and the deficiency would continue to increase if the enforcement of the Judgment was denied. The chances of any recovery on a deficiency Judgment appeared remote based upon the financial information disclosed by the Petitioner's corporation in its bankruptcy case. The Petitioner had conceded at trial that it had not made a single payment on the note since 1990. The trial court acted well-within its discretion in deciding to terminate the appellate stay.

Connecticut appellate practice also provides for expedited appellate review of a decision to terminate a stay. *See* Connecticut Practice Book Section 4049. Petitioners took advantage of this review process in this case and filed a Motion For Review. Respondent filed its Opposition and the Appellate Court ultimately ruled against the Petitioner and decided not to modify the decision below.

As is made clear from the forgoing, Connecticut rules of appellate practice provided the Petitioner with ". . . an opportunity to be heard . . . at a meaningful time and in a meaningful manner." The Fourteenth Amendment has never been construed so far as to prohibit enforcement of a judgment before all avenues of appellate relief have been exhausted or to prohibit an Appellate Court from dismissing an appeal for failing to follow the rules or to prosecute an appeal with due diligence. In the present matter, the Connecticut procedures at issue permit the trial court to terminate the appellate stay if it finds that the appeal was filed in bad faith, namely for the sole purpose of delay. The Connecticut rules further provide for an expedited review by the appellate court of such an order. Accordingly, Connecticut's procedures comport fully with the due process requirements of the Fourteenth Amendment.

## CONCLUSION

For the forgoing reasons, the petition should be denied.

Respectfully submitted,

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